## Suzimi bin Shaari v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–22 OF 2007
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
15 MARCH 2011

B

*Criminal Procedure — Conviction — Alteration of conviction, on appeal — Accused convicted and sentenced to death on two charges of trafficking in cannabis — Drugs in second charge found in accused's bedroom — Defence that drugs for own consumption — Small amount of drugs — Whether defence inherently probable and believable — Whether conviction on second charge should be set aside — Whether breach of s 289 of the Criminal Procedure Code if mandatory whipping under s 39A(2) of the Dangerous Drugs Act 1952 imposed on accused*

C

D

The appellant ('accused') was convicted and sentenced to death by the High Court on two charges of trafficking under the s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The first charge was of trafficking in 4,877g cannabis at the Gunung Semanggol rest area off the North-South Highway while the second charge was of trafficking in 263.2g cannabis at his house in Simpang Empat, Semanggol. The accused appealed to the Court of Appeal against the conviction and sentence. The prosecution's story on the first charge was that the accused had driven a factory bus to the Gunung Semanggol rest area to meet a policeman ('PW2') posing as a drug purchaser for the purpose of selling to PW2 5kg of cannabis at an agreed price of RM5,700. PW2 had been introduced to the accused two days earlier by a police informer and the deal for the sale and purchase of the drug was struck at that meeting. Evidence was given that when the accused got down from the bus at the rest area carrying a box and as he neared PW2, the police party lying in ambush arrested the accused and found the box to contain the cannabis. The accused was then taken to his house where, from his bedroom, they found two bags also containing cannabis. In his defence the accused said he did not go to the rest area to deliver cannabis but only to meet the person who wanted to buy the drug. He claimed after he was arrested by the police party, the police boarded the bus where they found a box and they told him to admit that the box belonged to him. He denied the box or the drugs in it belonged to him. However, with regard to the cannabis found at his house the accused admitted they were for his own consumption and not for sale. He said he had been a drug addict for ten years and smoked cannabis four to five times a day. These facts were corroborated by his wife. On the first charge, the High Court found there was evidence of actual trafficking by the accused. On the second charge, it ruled that the evidence against the accused on the first charge was relevant and admissible under s 15 of the Evidence Act 1950 to show knowledge and intention of the accused and

E

F

G

H

I

A that the possession was not accidental. The accused's defence on the first charge was rejected as an afterthought. His defence on the second charge that the drugs were for his own consumption was also rejected on the grounds: (i) the cannabis found in the bedroom was compressed and packed, showing it was meant for sale; (ii) the accused's wife's was an interested witness and her B evidence could not be accepted and she also did not know about the drugs being in the bedroom; and (iii) the accused was addicted to heroin/morphine.

**Held**, dismissing the appeal on the first charge and allowing the appeal on the second charge:

C

(1) The trial judge erred in rejecting the accused's defence on the second charge. His defence that the drugs were for his own consumption, considered with the fact the amount of cannabis involved was small and that it was kept in his bedroom, was not inherently improbable and unbelievable. He had raised doubt in the prosecution's case that the D cannabis found in his bedroom was for trafficking (see para 57).

(2) Under s 39A(2) of the DDA a minimum whipping of ten strokes was mandatory. However, that provision must be read subject to s 289 of the Criminal Procedure Code which, inter alia, provides that males E sentenced to death shall not be punished with whipping. As the accused had been sentenced to death on the first charge, to sentence him to whipping would be in breach of s 289 (see para 58).

(3) The sentence of ten years imprisonment was adequate taking into consideration the facts and circumstances of the case. The accused had no F previous conviction. The nett weight of cannabis involved was 263.2g only, which was in excess of 63.2g of the presumed trafficking weight under s 37(da) of the DDA (see para 58).

(4) As to the defence that he was a victim of entrapment, the accused failed G to show he was an 'unwary innocent' who would not, but for the entrapment, have committed the offence. The evidence was clear that the accused readily participated in the offence on the first charge (see para 43).

H (5) The accused's defence on the first charge was difficult to be believed. It was an afterthought and failed to raise any reasonable doubt on the prosecution's case (see paras 47–48).

**[Bahasa Malaysia summary**

I Perayu ('tertuduh') disabitkan dan dihukum gantung sampai mati oleh Mahkamah Tinggi atas dua tuduhan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pertuduhan pertama adalah bagi pengedaran 4,877g kanabis di Kawasan Rehat Lebuhraya Utara-Selatan Gunung Semanggol manakala pertuduhan kedua adalah bagi pengedaran

263.2g kanabis di rumahnya Simpang Empat, Semanggol. Tertuduh merayu ke Mahkamah Rayuan terhadap pensabitan dan hukuman. Cerita pendakwaan mengenai pertuduhan pertama adalah bahawa tertuduh telah memandu bas kilang ke Kawasan Rehat Gunung Semanggol untuk bertemu dengan polis ('PW2') yang menyamar sebagai pembeli dadah bagi tujuan menjual kepada PW2, 5kg kanabis pada harga yang dipersetujui, RM5,700. PW2 diperkenalkan kepada tertuduh dua hari lebih awal oleh pemberi maklumat polis dan urusan bagi jual dan beli dadah dibatalkan ketika perjumpaan. Keterangan diberikan bahawa apabila tertuduh turun dari bas di kawasan rehat membawa sebuah kotak dan dia mendekati PW2, pasukan polis serang hendap menahan tertuduh dan menjumpai kotak yang mengandungi kanabis. Tertuduh kemudiannya dibawa ke rumahnya di mana, daripada bilik tidurnya, mereka menjumpai dua beg juga mengandungi kanabis. Dalam pembelaannya, tertuduh menyatakan dia tidak pergi ke kawasan rehat untuk menghantar dadah tetapi untuk berjumpa orang yang hendak membeli dadah tersebut. Dia mendakwa selepas dia ditahan oleh pasukan polis, polis menaiki bas di mana mereka menjumpai sebuah kotak dan mereka memberitahunya untuk mengaku bahawa kotak adalah miliknya. Dia menafikan bahawa kotak mahupun dadah-dadah di dalamnya adalah miliknya. Walau bagaimanapun, berkenaan kanabis yang dijumpai dalam rumahnya, tertuduh mengakui ia adalah untuk kegunaannya dan bukan untuk dijual. Dia mengatakan bahawa dia adalah penagih dadah selama sepuluh tahun dan mengambil kanabis empat hingga lima kali sehari. Fakta-fakta ini disokong oleh isterinya. Bagi pertuduhan pertama, Mahkamah Tinggi mendapati tiada bukti bagi pengedaran sebenar oleh tertuduh. Bagi pertuduhan kedua, ia memutuskan bahawa keterangan terhadap tertuduh bagi pertuduhan pertama adalah relevan dan boleh diterima di bawah s 15 Akta Keterangan 1950 untuk menunjukkan pengetahuan dan niat tertuduh dan milikan bukanlah secara tidak sengaja. Pembelaan tertuduh bagi pertuduhan pertama ditolak sebagai sesuatu yang difikirkan kemudian. Pembelaannya bagi pertuduhan kedua adalah bahawa dadah-dadah tersebut adalah bagi kegunaannya juga ditolak atas alasan-alasan: (i) kanabis yang dijumpai dalam bilik tidurnya mampat dan dibungkus, menunjukkan ia adalah bagi tujuan jualan; (ii) isteri tertuduh adalah saksi berkepentingan dan keterangannya tidak boleh diterima dan dia juga tidak tahu mengenai dadah di dalam bilik tidur; dan (iii) tertuduh ketagihan heroin/morfin.

**Diputuskan**, menolak rayuan terhadap pertuduhan pertama dan membenarkan rayuan terhadap pertuduhan kedua:

(1) Hakim bicara terkhilaf dalam menolak pembelaan tertuduh dalam pertuduhan kedua. Pembelaan bahawa dadah-dadah tersebut adalah bagi kegunaannya, ditambah dengan fakta jumlah kanabis terlibat adalah kecil dan ia disimpan dalam bilik tidurnya, bukan tidak berkemungkinan sesungguhnya dan sukar dipercayai. Dia telah membangkitkan keraguan

A dalam kes pendakwaan bahawa kanabis yang dijumpai dalam bilik tidurnya adalah untuk pengedaran (lihat perenggan 57).

(2) Di bawah s 39A(2) ADB, sepuluh sebatan minima adalah mandatori. Walau bagaimanapun, peruntukan mesti dibaca subjek kepada s 289 Kanun Prosedur Jenayah yang mana, antara lain, memperuntukkan B bahawa lelaki yang dihukum gantung sampai mati tidak boleh dihukum dengan sebatan. Memandangkan tertuduh telah dihukum gantung sampai mati dalam pertuduhan pertama, untuk menghukumnya sebatan adalah pelanggaran s 289 (lihat perenggan 58).

C (3) Hukuman 10 tahun penjara adalah cukup, mengambilkira fakta-fakta dan hal-hal keadaan kes. Tertuduh tidak mempunyai sabitan terdahulu. Berat bersih kanabis terlibat adalah 263.2g sahaja, yang hanya lebih 63.2g daripada berat anggapan mengedar dadah di bawah s 37(da) ADB (lihat perenggan 58). D

(4) Mengenai pembelaan bahawa dia adalah mangsa pemerangkapan, tertuduh gagal untuk menunjukkan bahawa dia adalah 'unwary innocent' yang tidak akan, jika tidak kerana pemerangkapan, melakukan kesalahan tersebut. Bukti jelas bahawa tertuduh secara sukarela E mengambil bahagian dalam kesalahan bagi pertuduhan pertama (lihat perenggan 43).

(5) Pembelaan tertuduh bagi pertuduhan pertama sukar dipercayai. Ia adalah sesuatu yang difikirkan kemudian dan gagal membangkitkan F keraguan munasabah bagi kes pembelaan (lihat perenggan 47–48).]

**Notes**

For cases on alteration of conviction on appeal, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1649–1729.

G

**Cases referred to**

*Cohen Lorraine Philis & Anor v PP and another appeal* [1989] 3 MLJ 289, SC (refd)

*Herchun Singh & Ors v PP* [1969] 2 MLJ 209, FC (refd) H

*Munusamy Vengadasalam v PP* [1987] 1 CLJ 250, SC (refd)

*Namasiyiam Doraisamy v PP & other cases cases* [1987] 1 CLJ 540, SC (refd)

*Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)

I *Ti Chuee Hiang v PP* [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)

*Wan Mohd Azman bin Hassan v PP* [2010] 4 MLJ 141; [2010] 4 CLJ 529, FC (refd)

*Wan Yurillhami bin Wan Yaacob & Anor v PP* [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

**Legislation referred to**

Criminal Procedure Code s 289
Dangerous Drugs Act 1952 ss 2, 6, 37(da), 39A(2), 39B(1)(a), (2), 40, 40A
Evidence Act 1950 ss 15, 114(g)

**Appeal from**: Criminal Trial Nos 45–13– of 2005 and 45–14 of 2005 (High Court, Taiping)

*Bernard Francis (Bernard Francis) for the appellant.*
*Fatnin bt Yusof (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Hasan Lah JCA:**

**[1]** The accused was charged with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). First, he was charged with trafficking in 4,877g of cannabis on 2 August 2001 at the Gunung Semanggol rest area, km195.5, North-South Highway, in the District of Kerian, Perak. Secondly, he was charged with trafficking in 263.2g of cannabis on the same date at No 127, Jalan Gula, Simpang Empat, Semanggol in the District of Kerian, Perak.

**[2]** The accused was convicted by the learned trial judge on both the charges and sentenced to death. He appealed against the decision. We heard his appeal and dismissed his appeal in respect of the first charge. In respect of the second charge, we allowed his appeal and set aside the order of the learned trial judge and convicted him under s 6 of the Act read together with s 39A(2) of the Act. He was then sentenced to ten years imprisonment with effect from the date of his arrest for possession of 263.2g of cannabis.

**[3]** We now give the grounds of our decision.

**[4]** The evidence as unfolded revealed the following facts. Pursuant to an arrangement made by an informer PW2 (D/L Kpl M Ananthakrishnan), who acted as an agent provocateur and posed as a drug purchaser, met with the accused at the accused's house on 31 July 2001 at about 10pm. At the meeting PW2 was accompanied by the informer.

**[5]** At the accused's house, the informer introduced PW2 to the accused. After about five minutes, PW2 asked the informer to buy cigarettes and leave both of them alone.

**[6]** After the informer left, PW2 told the accused that he was a drug trafficker from Kuala Lumpur and wanted to buy the drug from the accused. The

accused agreed to supply 5kg of cannabis at a price of RM1,400 for a kilogram. After negotiation the accused agreed with the price of RM5,700 for 5kg of cannabis.

**[7]** It was agreed that the delivery of the cannabis would be made at the Gunung Semanggol rest area, on the left side of the North-South Highway heading towards Kuala Lumpur, on 2 August 2001 at 10pm. The accused told PW2 that he would go there with a factory bus. PW2 then gave his mobile phone No 012-5176666 to the accused and the accused also gave his mobile phone No 012-4568590 to him.

**[8]** In the morning of 2 August 2001 PW2 called the accused and asked him about the arrangement that night (*malam ni macam mana*) and the accused answered 'line clear'. At about 8pm PW6 (ASP Nor Aimi bin Abdullah) briefed his men of their duties in the ambush and PW6 asked PW2 to proceed with his dealing with the accused. PW6 also instructed PW7 (D/L Kpl Rosli bin Budin and D Kpl Zamri to keep their eyes on the accused and to tail the accused from his house to the place where the drug was supposed to be delivered to PW2.

**[9]** At about 8.25pm PW2 called the accused and informed him that he was on his way to the place where the drug was supposed to be delivered to him by the accused. The accused told PW2 to call him when he arrived at the Gunung Semanggol rest area.

**[10]** At about 9.15pm PW2 called the accused again and informed him that he had arrived at the agreed place. The accused asked him whether he had enough money and PW2 told the accused that he had the money. PW2 then asked the accused whether he had the drug with him and the accused told PW2 that he had the drug (*Barang sudah ada, awak jangan bimbang. Barang kali ini memang yang paling power*). The accused also informed PW2 the place of the delivery of the drug had been changed to the other side of Gunung Semanggol rest area, as one heads towards the north.

**[11]** PW2 and the raiding party then went to the new place. At about 10pm PW2 called the accused and informed him that he had arrived at the new place of delivery. At about 10.10pm PW2 saw a blue factory bus No PBH 9399 arrived and stopped about 30 meters from PW2. The accused got off from the bus and went to meet PW2. The accused asked PW2 about the money and PW2 told him the money was in the car. PW2 then asked the accused about the drug and the accused told him he had the drug. PW2 then asked the accused to bring the drug to his car and he would then pay the accused for the drug.

**[12]** The accused then drove the bus and stopped it near PW2. He got down from the bus through the passengers' door carrying a box. When the accused

was near PW2, PW2 gave the signal to the ambush team to arrest the accused and he identified himself to the accused as a policeman and he put his arms around the accused's body. The accused let go of the box.

**[13]** PW6 then arrived at the place and seized the box. Inside the box PW6 found five compressed slabs of dried leaves which he suspected to be cannabis.

**[14]** From there PW6 took the accused to the accused's house. Inside the bedroom of the accused's house, PW6 found a bag. Inside the bag there was a pink plastic bag which contained a slab of cannabis. Beside the bag there was a small batik bag. Inside the batik bag PW6 found another pink plastic bag which contained three packets of cannabis.

**[15]** All the exhibits recovered were handed over to the investigating officer ('PW8') on 3 August 2001 at about 12.20am at the Narcotics Department, Kerian, Perak. On 6 August 2001 PW8 sent the drug exhibits to the government chemist ('PW5') at the chemistry department, Perak and on 31 October 2001 he received them back from PW5.

**[16]** PW5 testified that after he analysed the drugs he found them to be cannabis as defined in s 2 of the Act. The nett weight of the cannabis recovered at the Gunung Semanggol rest area was 4,877g and the nett weight of the cannabis recovered from the accused's house was 263.2g.

**[17]** In his defence the accused said he had known a person by the name of Khalid three or four years prior to the incident. On 30 July 2001 Khalid came to his house and told him his friend wanted to see him to buy drug from him. On the following day, 31 July 2001, at about 7.30pm Khalid came with an Indian man to his house. Khalid introduced the Indian man to him as 'Mike'.

**[18]** According to the accused Mike wanted to buy cannabis from him. The accused told Mike that he would try to get the drug from his friends. The accused claimed that in the discussion Khalid asked him to get the drug as he did not want to disappoint Mike. The accused also claimed that Khalid was with them when he and Mike were discussing the supply of the cannabis. There was also another person by the name of Wan at that time. Wan was the accused's friend and Wan also took part in the discussion.

**[19]** The accused denied that he promised to supply the cannabis to Mike. He also denied he told Mike that the price of the cannabis was RM1,400 per kg and he agreed to supply 5kg of cannabis to Mike. He further denied that he told Mike the price for 5kg of cannabis was RM5,700. He also denied he promised to deliver the drug at Gunung Semanggol rest area of the North-South Highway.

**[20]** On 1 August 2001 Khalid called the accused twice to inquire about the drug and he told Khalid the drug was not yet available. On 2 August 2001 at about 11.30am Mike called him and asked him whether he had the drug and he told Mike he still did not have the drug. Mike then told the accused that he wanted to meet the accused at Gunung Semanggol rest area, on the side as one heads towards the north, at about 10pm that night.

**[21]** At about 5.30pm Mike called him again and asked him whether he would be coming. He told Mike that he would be coming to the place and would drive a factory bus.

**[22]** At about 9.30pm that night he went to Gunung Semanggol rest area to meet Mike. He claimed that he went there not for the purpose of delivering the drug to Mike. When he arrived there he stopped his bus near Mike who was waving his hands at him. After parking the bus he walked towards Mike and when he was close to Mike, Mike held him, and shouted 'tangkap' two or three times. At the same time a number of police officers rushed towards them and handcuffed him.

**[23]** The accused claimed a few police officers boarded the bus at the same time. A few minutes later the police officers got down from the bus carrying a box. They asked him to admit that the box belonged to him.

**[24]** The accused denied that when he got down from the bus to meet Mike he was carrying a box. He denied that he put the box in the bus. He denied he was a drug trafficker. He denied that the box which contained the cannabis belonged to him.

**[25]** With regard to the second charge, the accused admitted that the cannabis found in the house belonged to him. His defence was that the cannabis was for his own consumption. He was a drug addict for ten years. He smoked cannabis four to five times a day. The cannabis found in his house was not for sale.

**[26]** At the close of the prosecution's case the learned trial judge held that the prosecution had proved a prima facie case against the accused on both the charges. With regard to the first charge the learned trial judge held that there was evidence of actual trafficking against the accused. The prosecution had adduced evidence of the agent provocateur (PW2), which was admissible under s 40A of the Act, of the meetings with the accused, the negotiations for the sale and purchase of the proscribed drug, and finally when the accused was arrested he was delivering the proscribed drug to PW2. In other words, the learned trial judge found the accused was trafficking in the proscribed drug as

defined under s 2 of the Act. The learned trial judge therefore ruled that a prima facie case had been proved against the accused on the first charge. A

**[27]** With regard to the second charge, the learned trial judge ruled that the evidence against the accused in the first charge was relevant and admissible under s 15 of the Evidence Act to show knowledge or intention of the accused and that the possession was not accidental. The learned trial judge therefore held that a prima facie case had been proved against the accused on the second charge as the accused was keeping the cannabis found in the bedroom of his house. B C

**[28]** With regard to the accused's defence on the first charge the learned trial judge held that the accused's defence was an afterthought. The learned trial judge further held that the person 'Khalid' mentioned by the accused in his evidence was the informer mentioned by PW2. On the evidence adduced, the learned trial judge found that the informer did not take part in the negotiation between PW2 and the accused, and the informer's role was only to introduce PW2 to the accused. D

**[29]** With regard to the accused's defence on the second charge, the learned trial judge rejected the accused's defence that the cannabis found in the bedroom of his house was for his own consumption. The learned trial judge rejected the evidence of DW2, the accused's wife, on the ground that DW2 was an interested witness and DW2 did not know that the cannabis was kept in the bedroom. Further, the accused was addicted to heroin/morphine based on exh P29. The cannabis was kept in a compressed form and packed which showed that it was meant for sale. E F

**[30]** The learned trial judge therefore ruled, at the conclusion of the trial, that the accused failed to raise any reasonable doubt in the prosecution's case on both the charges. G

**[31]** With regard to the first charge learned counsel for the accused submitted that the informer played an active role in this case and in fact was an agent provocateur. As such he was not protected under s 40 of the Act. He ought to be called by the prosecution or be offered to the defence. In support of that learned counsel cited the decision of the Federal Court in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1. H

**[32]** The issue relating to informer and agent provocateur had been discussed by the apex court in a number of cases. The law that deals with the issue of agent provocateur and informer is provided under ss 40 and 40A of the Act. Whether a person is an informer or has become an agent provocateur would depend on the facts of each particular case (see *Munusamy Vengadasalam* I

A *v Public Prosecutor* [1987] 1 CLJ 250; *Namasiyiam Doraisamy v Public Prosecutor & other cases* [1987] 1 CLJ 540; *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233; *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17).

B **[33]** The issue in the present case is whether PW2 is to be treated as an agent provocateur or as an informer. We had carefully considered the evidence available and the finding of the learned trial judge on this issue and we were in agreement with the learned trial judge that the informer ('Khalid') did not take part in the discussion or negotiation. His role was merely to introduce PW2 to
C the accused. As such the informer ('Khalid') was afforded the protection under s 40 of the Act. The non-calling or the non-offering of the informer had not caused any gap to the prosecution's case. In this connection we would like to refer to the observation made by Zulkefli Makinudin FCJ in *Wan Yurillhami bin Wan Yaacob* at p 761 (MLJ); pp 31–32 (CLJ):

D

> [25] Still on the issue of whether the failure to call Seman, the informer is fatal to the prosecution's case, I would like to refer to the recent decision of the Federal Court in the case of *Ghazalee Kassim & Ors v Public Prosecutor* [2009] 4 CLJ 737 wherein on this same issue Zaki Tun Azmi CJ in delivering the judgment of the court had this to say:
>
> E
>
> > Who was Ah Meng? Was Ah Meng an informer or was he an agent provocateur? Does it make any difference whether Ah Meng is an informer or agent provocateur? Has the failure of the prosecution to call Ah Meng or offer him as a witness to the defence prejudiced the appellants? On the facts of this
> F case, has it raised any reasonable doubt as to the guilt of the appellants?
>
> [26] The Federal Court, further at p 745 of the judgment stated as follows:
>
> > Section 40A of the Dangerous Drugs Act, places an agent provocateur's
> G evidence no less credible than any witness merely by virtue of him being such. The reason according to the third appellant why he wanted Ah Meng was to support his defence that he was, at the Lion City Hotel, to meet Ah Meng to collect a gambling debt. According to the third appellant, Ah Meng had a gambling debt amounting to RM25,000 owing to him. Assuming that this is so, why did he count the money brought by the prosecution witness PW10
> H amounting to RM70,000 instead of just asking for the RM25,000 allegedly owed to him? There was no indication that he questioned why there was RM70,000 instead of RM25,000.
>
> [27] The Federal Court in the above case ruled that based on the facts, the court
> I would not invoke s 114(g) of the Evidence Act. Similarly, it is my judgment in the present case that the non-calling or the non-offering Of the informer by the prosecution had not caused any gap to the prosecution's case as it does not tend to explain the presence of the first appellant other than for the purpose of supplying the drugs to SP7. Therefore, Seman the informer in the present case is afforded the protection under s 40 of the Act.

**[34]** Further, the finding of the learned trial judge that the informer did not take part in the negotiation was a finding of fact. The learned trial judge who had the advantage of audio-visual of all the witnesses during their testimonies did not believe the version of the accused. As such we should be slow in interfering with such finding of fact (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209).

**[35]** The next issue raised by learned counsel for the accused was that there was doubt and gap in the prosecution's case because this case was based on a trap set up by the police. Learned counsel for the accused argued that even though entrapment is not a substantive defence the court must give due weight to the accused's explanation in his defence. As to what was discussed between PW2 and the accused on 31 July 2001 the court only had to consider the evidence of PW2 and the accused. Learned counsel contended that the existence of the box was only mentioned for the first time at the place the accused was arrested. PW7, who was tailing the accused from his house, did not mention anything about the box.

**[36]** Learned counsel also contended that there was inconsistency in the prosecution's evidence with regard to the seizure of the box containing the drug. PW2 and PW6 testified that the box was found on the road whereas in exh P14 (the police report) it was stated that the box was seized from the accused. Learned counsel for the accused therefore submitted that on the evidence available it was not safe to convict the accused.

**[37]** As stated earlier the learned trial judge accepted PW2's evidence that there was negotiation between PW2 and the accused on 31 July 2001 at the accused's house whereby the accused agreed to supply 5kg of cannabis at the price of RM5,700. The presence of the accused at Gunung Semanggol rest area at about 10 on 2 August 2001 gave credence to PW2's evidence about the negotiation. The accused was seen carrying a box which was later found to contain the proscribed drug.

**[38]** Further, PW7 (D/L Kpl Rosli bin Budin), who was asked by PW6 to follow and observe PW2, testified that on 31 July 2001 he and D/L Kpl Mat Zaki had tailed PW2 who was driving a car. PW2 picked up a passenger (the informer) at Pejabat Pos Simpang Empat Semanggol. From there PW2 and his passenger went to a house. Five minutes after they arrived at the house PW7 saw the passenger driving PW2's motorcar heading towards Simpang Empat town. He came back to the house about 20 minutes later and about 2 or 3 minutes after that PW2 and the passenger left the house.

**[39]** From PW7's evidence PW2 was at the accused's house for about 25 minutes. PW2 therefore had sufficient time to negotiate with the accused for

the supply of the drug. It must be noted that the negotiation took place at the accused's house. In his defence the accused did not deny that there was negotiation at his house for him to supply drug to PW2. He however denied that he agreed to supply 5kg of cannabis at a price of RM5,700 and that he would deliver the drug at Gunung Semanggol rest area.

**[40]** We were of the view that the decision of the learned trial judge to reject the accused's defence was correct. What took place after that did not support the accused's defence. The accused was arrested at the Gunung Semanggol rest area and he was found carrying about 5kg of cannabis. If he did not agree to supply 5kg of cannabis to PW2 why did he have in his possession 4,877g of cannabis? And why did he go to Gunung Semanggol rest area at about 10pm to meet PW2 if not to deliver the drug? We were unable to accept the accused's explanation that he went there just because PW2 wanted to meet him there. It must be noted that the accused only knew PW2 on 31 July 2001. There was no reason for them to be so friendly.

**[41]** In his judgment the learned trial judge said:

> Tertuduh gagal menjelaskan di sini sekiranya bukan beliau yang hendak membekalkan ganja yang dipesan oleh SP2 dan bekalan ganja juga tidak ada:
>
> (i) apa perlu SP2 hendak berjumpanya;
>
> (ii) apa perlu tertuduh bersusah payah pergi berjumpa dengan Mike di Hentian Rehat Gunung Semanggol; dan
>
> (iii) apakah tujuan mereka berjumpa.
>
> Ini gagal dijelaskan oleh tertuduh.
>
> Ini semua menunjukkan pembelaan tertuduh hanya suatu dakwaan atau rekaan tertuduh semata-mata untuk melepaskan dirinya.

**[42]** As regards the contention that this was a case of entrapment, we need only refer to the decision of the Federal Court in *Wan Mohd Azman bin Hassan v Public Prosecutor* [2010] 4 MLJ 141; [2010] 4 CLJ 529 that the common law position that entrapment is not a substantive defence remains the law. It is for the accused to prove that he committed the offence as a result of an entrapment.

**[43]** In our view the accused failed to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed the offence. On the contrary, the evidence was clear that the accused readily participated in the offence.

**[44]** We further found that there was no material inconsistency in the prosecution's evidence as to the place the box was recovered by PW6. PW2 testified that when the accused got down from the bus he was carrying the box and when the accused was in the process of handing over the box to him he introduced himself as a police officer and tried to arrest the accused. The accused then let go of the box and the box fell on the road.

**[45]** According to PW6 he saw the accused carrying the box after he got down from the bus. When PW6 saw the pre-arranged signal given by PW2 he rushed to arrest the accused. When he reached the accused he saw the box was already on the road. In his police report, P14, PW6 said '... dan rampas darinya satu kotak yang mengandungi (5) slab mampat yang disyaki dadah ganja yang dipegang olehnya'.

**[46]** Looking at the evidence as a whole we did not think there was a material inconsistency in the prosecution's evidence with regard to the box. The evidence showed that before he was arrested the accused was holding the box and he was the one who carried the box to the place for the purpose of delivering it to PW2. There was therefore no merit in the defence's contention on this issue.

**[47]** The defence of the accused had been carefully considered by the learned trial judge in the light of the totality of the evidence adduced by the prosecution. We were in agreement with the finding of the learned trial judge that the accused's defence was an afterthought.

**[48]** We had considered the defence put up by the accused. The defence of the accused in respect of the first charge was difficult to be believed. More importantly, it failed to raise any reasonable doubt in the prosecution's case. We came to the conclusion that the learned trial judge was right in convicting the accused on the first charge for the offence of trafficking in the proscribed drug.

**[49]** For the above reasons we found the accused's appeal in respect of the first charge was devoid of any merit. It was dismissed. The conviction and sentence imposed by the learned trial judge were therefore affirmed.

**[50]** With regard to the second charge learned counsel for the accused submitted that the learned trial judge had erred in his finding that a prima facie case had been proved against the accused. He contended that the prosecution failed to prove that the drug found in the bedroom was in the exclusive possession of the accused. The accused's wife was not called to testify that the drug did not belong to her.

**[51]** In the alternative, learned counsel for the accused submitted at most the accused ought to be convicted for possession of the cannabis as he was a drug addict and the amount of the drug involved was only 263.2g.

**[52]** We were of the view that the learned trial judge was right to rule that a prima facie case had been proved against the accused on the second charge. We could not find any flaw in the learned trial judge's decision when he ruled:

> Berdasarkan keterangan SP6 dan pemakaian s 15 Akta Keterangan serta kes *Wong Yew Ming*, pihak pendakwaan telah membuktikan kes prima facie bahawa tertuduh menyimpan (*keeping*) ganja yang dirampas dari dalam P18A dan P19A dari dalam bilik tidur tertuduh.

**[53]** It is to be observed that during cross-examination of PW6, the defence never suggested to PW6 that the drug found in the accused's bedroom did not belong to the accused. The accused's wife ('DW2') was offered by the prosecution to the defence at the close of the prosecution's case. According to PW6 he found a diary belonging to the accused in the bag that contained the cannabis.

**[54]** On the evidence available we found no merit in the defence's contention on this issue.

**[55]** We had carefully considered the accused's defence that he was a drug addict and the cannabis found in his bedroom was for his own consumption. The urine test report, exh P29, showed that he was addicted to morphine. The accused testified that he was addicted to cannabis since ten years ago. He smoked cannabis four or five times a day. His wife (DW2) corroborated his testimony. She said she knew the accused was a drug addict. She saw the accused smoking cannabis.

**[56]** The accused was entitled to raise the defence of own personal consumption in a trafficking case. This has been clearly stated by the Supreme Court in *Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal* [1989] 3 MLJ 289. At p 291 Abdul Hamid LP said:

> Despite the wide definition of the word 'trafficking' in the Act and as stated by this court in *Teh Geok Hock v Public Prosecutor* that the definition sounds artificial and is not in accordance with the ordinary meaning of the word 'trafficking', it does not mean that the defence of own personal consumption can never be raised at all by evidence.
>
> It is implicit in the judgment in *Teh Geok Hock* that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case. In our view to say that the defence of personal consumption is never available is to render meaningless the law on statutory presumption as stated in

*Public Prosecutor v Yuvaraj* which has been accepted by our courts and become part of our law. Thus we cannot accept the point raised by the deputy public prosecutor in this regard in the light of the rebuttable presumption specifically provided for in s 37(da) of the Dangerous Drugs Ordinance.

**[57]** We had carefully considered the accused defence in respect of the second charge and we were of the considered view that his defence that the cannabis found in his bedroom was for his own consumption, when considered with the fact that the amount of the cannabis involved was small and it was kept in his bedroom, was not inherently improbable and unbelievable. In our view, the learned trial judge had erred in rejecting the accused's defence. The accused, in our view, had raised doubt in the prosecution's case that the cannabis found in his bedroom was for trafficking. We accordingly allowed his appeal and set aside the conviction under s 39B(1)(a) and punishable under s 39B(2) of the Act. In substitution thereof we found him guilty of possession of the proscribed drug and convicted him under s 6 read with s 39A(2) of the Act. He was sentenced to ten years imprisonment. We did not make any order of whipping.

**[58]** The public prosecutor's appeal in respect of our decision on the second charge only related to the punishment meted out by us. We were of the view that a sentence of ten years imprisonment was adequate after taking into consideration the facts and circumstances of the case. The drug involved was cannabis with a nett weight of 263.2g only, which was in excess of 63.2g of the presumed trafficking weight under s 37(da) of the Act. He had no previous conviction. With regard to whipping, we were not unmindful of the fact that under s 39A(2) of the Act a minimum whipping of ten strokes is mandatory. However, that provision must be read subject to s 289 of the Criminal Procedure Code which provides, inter alia, that males sentenced to death shall not be punished with whipping. The accused had been sentenced to death for the first offence and as such to sentence him to whipping would, in our view, be in breach of s 289 of the Criminal Procedure Code.

*Appeal on the first charge dismissed; appeal on the second charge allowed.*

Reported by Ashok Kumar